SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1061

W. W. HINCHLIFFE,
Petitioner and Appellant Below,

vs.

THE TEXAS COMPANY, OHIO OIL COMPANY, AMERADA PETROLEUM CORPORATION, DEEP ROCK OIL CORPORATION,
Respondents and Appellees Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below

The opinion in the Court of Civil Appeals is reported in Volume 182, 2d Series, Southwestern Reporter, page 368.

II

Jurisdiction

1. The date of the decree to be reviewed is July 26, 1944 (182 S. W. 2d 368), being the decree of the Court of Civil

Appeals affirming the judgment of the trial court dated April 14, 1944 (R. 37). Such decree did not become final until December 20, 1944, upon the overruling of petitioner's motion for rehearing by the Supreme Court of Texas. This application is presented within 90 days from the time the decree became final.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237, (b), Judicial Code, Article 344, (b), Title 28, United States Code, annotated.

3. The Railroad Commission of Texas is charged by law with the duty of conserving the oil and gas of Texas, having authority to pass rules and regulations to such end and to administer them. Article 6029, R. C. S. of Texas. Pursuant thereto it passed the following rule effective at the time at issue herein:

> "It Is Hereby Ordered By the Railroad Commission of Texas that Rule No. 1 of Sub-division II (Drilling) of Division 3, being special rules governing the East Texas field, is hereby amended so that same shall hereafter read as follows:
>
> "*Rule 1. Spacing Rule.* No well for oil or gas shall hereafter be drilled in said East Texas field nearer than 660 feet to any other completed or drilling wells on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line or subdivision line; provided that the Commission in order to prevent waste, or to prevent the confiscation of property, will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property. When an exception to such rule is desired, application therefor shall be filed with the Commission fully stating the facts, which application shall be accompanied

by a plat drawn to the scale of one inch equalling four hundred (400) feet, accurately showing to scale the property on which permit is sought to drill a well under an exception to this rule, and accurately showing to scale all other completed, drilling or permitted wells on said property; and accurately showing to scale all adjacent surrounding properties and wells. Such application shall be verified by some person acquainted with the facts, stating that the facts therein stated are within the knowledge of the affiant true, and that the accompanying plat is accurately drawn to scale and correctly reflects all pertinent and required data. Such exception shall be granted only after at least ten (10) day's notice to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard, and after the Commission has determined that an exception to such rule is necessary either to prevent waste or to protect the property belonging to applicant from confiscation.

"Provided Further That the Railroad Commission of Texas, in order to prevent waste or to prevent the confiscation of property, may upon its own motion or order, issue or grant permit or permits for the drilling of any well or wells for oil or gas nearer than 660 feet to any other completed or drilling well on the same or adjacent tract of land or farm and nearer than 330 feet to any property line, lease line or subdivision line as hereinbefore prescribed whenever the Commission shall determine that the drilling of any such well or wells is necessary to prevent waste or to prevent the confiscation of property. When in the opinion or judgment of the Commission waste or confiscation of property is reasonably eminent or is taking place on any leasehold, the Commission may, on its own initiative or motion, order a hearing for the purpose of determining whether such waste or confiscation of property is taking place. Such permit or permits shall be issued or granted only after at least ten (10) day's notice to the owners of said leasehold and

to all adjacent lessees affected thereby has been given, and after public hearing at which all interested parties may appear and be heard and after the Commission has determined that the drilling of any well or wells for oil or gas is necessary either to prevent waste or to protect the owners of said leasehold from confiscation.

"No well drilled in violation of this rule without special permit obtained issued or granted in the manner prescribed in said rule, and no well drilled under such a special permit or on the Commission's own order which does not conform in all respects to the terms of such permit, shall be permitted to produce either oil or gas, and any such well so drilled in violation of said rule or in violation of a permit granted as a special exception to said rule or on the Commission's own order shall be plugged.

"The order entered by this Commission on August 30, 1933, commonly designated as the direct and equidistant offset order is hereby rescinded, annulled and shall be of no further force and effect. All other rules, regulations and orders of this Commission which conflict with the terms and provisions of Rule No. 1 as hereby amended and promulgated are hereby declared to have no further application to wells in said East Texas field to the extent of such conflict.

"In the adoption and promulgation of this order, it is here declared that the Commission intends to adopt each phrase, sentence, and paragraph separately and independently of each other such phrase, sentence, and paragraph, and if any portion of this order or any portion of the rule hereby adopted shall be declared invalid, such declaration and such invalidity shall not affect any other portion" (R. 5-7).

Petitioner applied for permits to drill two wells as required by the terms of the aforesaid rule. After a hearing the Railroad Commission granted such permits to the petitioner. The respondents brought this action to set

aside such permits and enjoin petitioner's drilling and production of the wells so permitted. The respondents alleged the action of the Railroad Commission in granting such permits to be null and void.

The petitioner (defendant in the trial court) joined issue as to this and among other defenses asserted the action of the Railroad Commission was valid because

> (a) "Said defendant would further show that the Railroad Commission of Texas has heretofore, since the promulgation of such Rule 37 as regards the East Texas Oil Field, granted a vast number of permits in exception to said Rule 37 in the East Texas Oil Field, upon the ground and reason that such permits would respectively increase the ultimate recovery of oil in the East Texas Oil Field, and that such ultimate recovery would be increased solely by reason of the fact that the more wells that are drilled, the greater will be the recovery of oil from such field. That such wells so permitted by the Railroad Commission of Texas are now operating and producing oil and gas from the East Texas Oil Field, and will continue to so do during the producing life of said field. That said East Texas Oil Field has been developed by the drilling of oil and gas producing wells therein upon such theory; that said field has been developed upon such theory up to the present time, which is when said field has reached its peak of development and of enforcing the spacing provisions of such purported Rule 37 at this time would amount to an unlawful discrimination, a denial of the equal protection of law, a rank injustice, and result in such inequities as would shock the judicial conscience of this Court and amount to unjust discrimination in the taking of the property of these defendants without due compensation thereof, and an invasion of their rights and property without due process of law, contrary to the terms and provisions of the Constitution of the United States of America, particularly the Fourteenth Amendment thereto, and of the

Constitution of the State of Texas, which are here and now expressly plead in bar of the action of said Plaintiff and Intervenor" (R. 23-24).

(b) "This defendant would further show that the Railroad Commisson of Texas, the agency charged by law with the duty of administration of such Rule 37, has heretofore and had, prior to the time of granting of the permits in question herein to this defendant, granted numerous permits in the East Texas Oil Field to other persons and lease holders similarly situated to this defendant where all of the factors and conditions surrounding the granting of such permits by the Railroad Commission of Texas were the same as surrounded this defendant and his property on which the permits in question were granted. That such permits so granted to others by the said Railroad Commission were not contested or appealed from by these plaintiffs' and wells were drilled under such permits and have been producing oil from the common East Texas Oil Field in which this defendant's property is located and are now and will continue for many years in the future to recover and produce oil from said common East Texas Oil Field. That by reason thereof to set aside the orders of the Railroad Commission of Texas in granting the permits in question to this defendant would constitute an unlawful and unjust discrimination in favor of others similarly situated to this defendant and against this defendant and deny this defendant the equal protection of the laws and deprive him of his property without due process of law as are vouchsafed to him by the Constitution of the United States of America and particularly the Fourteenth Amendment thereof and as vouchsafed by the Constitution of the State of Texas" (R. 24).

(c) "This defendant would further show that he is the owner of the oil, gas and mining lease upon the tract of land described in the permits under attack herein. That said land and premises have been proved of being productive of oil and gas and that there are

oil and gas wells situated on all sides of said property from which there is now being produced oil and gas and which was being produced at all times in controversy herein. That under the settled law of the State of Texas, which was a rule of property at the time of the acquisition of such property by this defendant and is presently a rule of property under the laws of the State of Texas, the owner of the land which was and is underlain by oil and gas, such as the property of the defendant in issue herein, had no right of ownership of such oil and gas in place but the rule of capture obtained and the owner of such property, as the defendant in this case, had the duty as well as the right in and to said property by the drilling of wells on his property. Such was the right of such owner and is the right of this defendant to protect the vested interest he has and holds in and to said property, to protect his property and property rights by the drilling of the wells at issue herein. That unless such permits are granted to this defendant, oil will be drained from beneath his property by the wells of adjacent lease holders and on adjacent tracts and by other wells in the East Texas Oil Field, and by reason thereof the deprivation of the wells at issue herein would constitute a taking of this defendant's property without due process of law and deny to him the equal protection of the laws as guaranteed to him by the Constitution of the United States of America and particularly the Fourteenth Amendment thereof and contrary to the laws and Constitution of the State of Texas" (R. 25).

(d) "That the Railroad Commission of Texas is the agency charged by law with the duty of administration and carrying into effect of such Rule 37 relied upon by the plaintiff and Intervenor herein, as the basis of their action. That such agency has by its acts and actions in the administration of such rule, heretofore construed same as permitting exceptions to be granted to applicants upon a showing of a prevention of waste by the increasing of the ultimate recovery of oil by

the drilling of such well, whether such greater ultimate recovery was by the fact that the more wells that are drilled, the more oil will be obtained, or by the other reason. That by their acts and conduct heretofore in the administration of such rule, the Railroad Commission of Texas has given a practical construction to such rule so as to grant exceptions upon a showing of a greater ultimate recovery by reason of the drilling of such well, regardless of the source from which such greater ultimate recovery was obtained. These defendants here and now expressly plead such practical construction of such rule in bar of the action of this Plaintiff and Intervenor, and would show that the well for which permit was granted by the Railroad Commission at issue herein, will increase the greater ultimate recovery of oil from the East Texas Oil Field than would obtain if such well is not permitted" (R. 22-23).

The petitioner, by such pleading, timely presented his rights to these defenses as guaranteed by the Federal Constitution, asserting thereby in the trial court at his first opportunity, that by permits being granted to others where the same or similar conditions prevailed, an unjust discrimination and unequal protection of the law, lack of due process and taking of his property would result if the relief sought by respondents was granted, because petitioner would be deprived of the same rights to permits as had been accorded to others, unless the action of the Railroad Commission granting him such similar rights and permits was upheld.

The respondents directed special exceptions to these defensive matters alleged by the petitioner. To the allegations set out above in (a), the defendant excepted as follows:

"Plaintiffs specially except to paragraph X of said answer asserting that permits have been granted to

others in the field solely on more wells, more oil testimony, and to deprive defendant of permits so granted would be confiscation and discriminatory, on each of the following separate grounds:

"(a) If defendant is affected by the permits granted to others on such basis he had an adequate remedy of filing suit to cancel same, and such allegations are irrelevant, immaterial and prejudicial.

"(b) Defendant cannot, on such basis, obtain an invalid permit from the Commission and insist that it be upheld by the courts, because such would be equally applicable to all other operators in the field, and would bring about complete destruction of the spacing rule and its usefulness as a conservation measure" (R. 34).

To the allegations the petitioner set out above in (b), respondents excepted as follows:

"Plaintiffs specially except to paragraph XI wherein it is alleged that permits have been granted to other operators similarly situated to defendant where all factors and conditions surrounding the granting of permit were the same as surrounded defendant and his property, because said allegation is irrelevant, immaterial and prejudicial, and is but the legal conclusion of the pleader, no facts being alleged upon which it can be adjudged whether the factors and conditions were all the same; and said allegation is vague and indefinite in that it does not name the other permittees or identify their leases, well numbers or Rule 37 permit numbers, and is too vague and indefinite to apprise plaintiffs of the permits which defendant contends were granted under the same conditions, nor are the conditions referred to by defendant described so that the Court and plaintiffs may know which surrounding conditions defendant refers to, so as to enable plaintiffs to investigate and be prepared to meet the issue of proof whether or not such conditions are in fact the same as exist in defendant's lease."

"4. Plaintiffs specially except to the allegation in Paragraph XI that plaintiffs did not contest or appeal from permits granted to other persons and leaseholders situated similarly because said allegation is irrelevant, immaterial and prejudicial."

"5. Plaintiffs specially except to the allegations in the Paragraph XI that to set aside the permits involved in this suit would be discriminatory and confiscatory as to defendant because the Commission had previously granted permits to other operators under the same surrounding conditions, on the following grounds, separately urged:

"(a) Said allegation is irrelevant, immaterial and prejudicial, and is merely the legal conclusion of the pleader.

"(b) If defendant's permit is otherwise shown to be illegal, it could not be upheld on the ground that permits have been granted to others under similar conditions, because if that conferred a legal right to the permit, then all other operators in the field would be entitled to obtain and have the courts uphold illegal permits under the same or similar surrounding conditions, which would bring about complete destruction of the spacing rule under which the permit in controversy was granted as an exception.

"(c) If defendant was affected by such permits granted to others he had an adequate remedy by filing suit to cancel same" (R. 33-34).

To petitioner's defenses as alleged in (c) above, the respondents directed the following special exceptions:

"Plaintiffs specially except to the allegation in Paragraph XII to the effect that under the settled law defendant had no right of ownership in the oil and gas in place and only the rule of capture obtained, and that by virtue thereof defendant had the right to drill the wells in controversy, because said allegations are but the legal conclusions of the pleader and are irrelevant, immaterial and prejudicial" (R. 35).

To petitioner's defense as alleged in (d) above, the respondents directed the following special exceptions:

> "1. Plaintiffs specially except to paragraph IX of said answer wherein defendant pleads a 'practical construction' of Rule 37 as authorizing granting of permits on the 'more wells, more oil' theory, on the following grounds, each separately urged:
>
> "(a) Said allegations are irrelevant and immaterial; and prejudicial.
>
> "(b) Said allegations are inconsistent with this allegation that said rule is invalid, and defendant may not attack the rule and at the same time construe it" (R. 33).

The trial court sustained these exceptions of the respondent, to which actions of the court the petitioner duly reserved an exception (R. 39).

These special exceptions went to the merits of the petitioner's rights and defenses in that they were based on the immateriality and irrelevancy of such matters raised by the allegations as defenses. Thus, we have presented the clear issue of whether the facts of actions and treatment of others similarly situated may be shown as a defense. Petitioner says it is permissible; otherwise, the courts of a state are given the right by their actions to deprive a citizen of the equal protection of law, due process of law and protection of property guaranteed by the Constitution of the United States. The action of the trial court deprived the petitioner of showing these defenses. Being thus deprived, judgment was rendered by the trial court declaring the permits granted by the Railroad Commission unto this petitioner to be void. Since for the purposes of the exceptions the allegations must be considered as true, the entry of such judgment is tantamount to a holding that although it is true that the Railroad Commission, as the agency charged

by law with the duty of administering such Rule 37, has heretofore construed same as allowing a permit upon a showing of an increasing of ultimate recovery thereby, such facts are immaterial and the action of the Railroad Commission granting this petitioner the same rights as consistently granted to others by the Railroad Commission was void; that although the Railroad Commission permitted the development of the East Texas Oil Fields from time of discovery to present date by allowing permits in exception to Rule 37 upon the basis that such permits would prevent waste by increasing the ultimate recovery of oil, and that vast numbers of such permits have been previously allowed to other persons the petitioner should not be heard to claim the same right, and the action of the Railroad Commission granting petitioner the same right was void; that although the Railroad Commission had prior to the granting of petitioner's permits granted numerous permits to other persons where all the factors and conditions surrounding the granting of such permits were the same as surrounding the petitioner and his property when the permits hereunder attacked were granted, such are immaterial and irrelevant, and despite them the order of the Railroad Commission granting such similar rights and treatment to the petitioner was void; that although the petitioner is the owner of oil-producing property in a state where the rule of capture is the settled property law, he cannot be heard to assert such right to prevent the drainage and confiscation of his property which was then obtaining by wells of adjacent leaseholders, and the order of the Railroad Commission granting him such right was void.

The petitioner properly reserved exception to the action of the trial court in sustaining the respondents' exceptions to petitioner's defensive matter aforesaid (R. 39) and appealed from the judgment herein to the Court of Civil Appeals of the Third Supreme Judicial District of

Texas, at Austin, and there urged the errors here complained of. Said Court of Civil Appeals affirmed the judgment of the trial court. Petitioner in due season filed motion for rehearing to the Court of Civil Appeals, petition for writ of error to the Supreme Court of Texas, and motion for rehearing thereon, in each of which the errors here complained of have been assigned and urged. Petitioner asserts and contends that his constitutional rights have been flagrantly disregarded in this case, and in the language of this Honorable Court, the courts have flouted the basic principle that all people must stand on an equality before the bar of justice of every American court. *Chambers* v. *State of Florida*, 309 U. S. 227, 241, 84 L. ed. 716, 724.

4. The cases believed to sustain such said jurisdiction are as follows: *Truax* v. *Corrigan*, 257 U. S. 312, 66 Lawyers Edition, 254; *Rogers* v. *State of Alabama*, 192 U. S. 226, 48 Lawyers Edition, 417.

III

Statement of the Case

This has already been stated under Section I of the preceding petition (pp. 1-5) and under the preceding Section II, subsection 3, of this brief (pp. 10-21), which are hereby adopted and made a part hereof.

IV

Specification of Errors

1. The said Court of Civil Appeals erred in holding that the action of the trial court in sustaining respondents' exceptions to the allegations contained in paragraph IX of petitioner's Second Amended Original Answer was proper.

2. The said Court of Civil Appeals erred in holding that the action of the trial court in sustaining respondents' ex-

ceptions to the allegations contained in paragraph X of petitioner's Second Amended Original Answer was proper.

3. The said Court of Civil Appeals erred in holding that the action of the trial court in sustaining respondents' exceptions to the allegations contained in paragraph XI of petitioner's Second Amended Original Answer was proper.

4. The said Court of Civil Appeals erred in holding that the action of the trial court in sustaining respondents' exceptions to the allegations contained in paragraph XII of petitioner's Second Amended Original Answer was proper.

V

ARGUMENT

Summary of the Argument

Point A. Where an administrative agency charged by law with the duty of administering a rule has in such administration given a practical construction thereto, all persons subject to such rule are entitled to the benefit of such practical construction and the deprival of such right by the action of a state court infringes upon the right of equal protection of the law guaranteed by the United States Constitution.

Point B. Where an administrative agency has granted permits for the drilling of oil wells to other persons where all the factors and conditions were the same as surrounded the granting of permits to another person, the deprival of the latter by action of a state court of the right to show such facts in defense of his permits denies him the equal protection of the law guaranteed by the United States Constitution.

Point C. Where an administrative agency had granted numerous permits in a particular oil field under its rule allowing such permits when shown necessary to prevent waste upon a showing of a prevention of waste by increasing the ultimate recovery of oil by the granting of the wells sought by such permits, and permitted the development of such field under such theory up to the time of a subsequent application for a permit in such field, the action of a state court in denying the applicant the right to show such conditions in support of his permits destroyed his right to the equal protection of law guaranteed by the United States Constitution.

Point D. Where under the settled law of a state the rule of capture is the rule of property, the action of a state court denying the right to a leaseholder to prevent the drainage and confiscation of his property by the drilling of wells, which was his only available means under the law, denied such leaseholder the equal protection of law guaranteed by the United States Court and constituted a taking of his property without due process vouchsafed by the United States Constitution.

Point A

Where an administrative agency charged by law with the duty of administering a rule has in such administration given a practical construction thereto, all persons subject to such rule are entitled to the benefit of such practical construction and the deprival of such right by the action of a state court infringes upon the right of equal protection of the law guaranteed by the United States Constitution.

It is the law of Texas that an interpretation by the Railroad Commission of Texas of one of its rules is deemed to have become a part of the Rule. 34 Texas Jurisprudence, 708; *Texas and Santa Fe Railway Company* v. *H. G. and*

Fuel Company, 51 S. W. (2) 284; *W. T. Compress Company* v. *P. and S. F. Railway Company*, 15 S. W. (2) 558.

The petitioner alleged that the Railroad Commission of Texas had construed its Rule 37 (p. 12) as permitting a permit in exception to the spacing provisions of such rule upon a showing of a greater ultimate recovery by reason of the well for which permit was so sought. Since the error complained of was the sustaining of an exception to such allegations, they must for this argument be considered as true. Being true, the action of the court in denying the petitioner the right to present such facts in bar of respondents' action as plead by the petitioner, prevented him from obtaining at the hands of the court an equal application of the law contrary to the intendment of the Fourteenth Amendment to the United States Constitution. In discussing this intendment, this Court in its decision of the *Truax* v. *Corrigan* case, *supra*, said:

> "* * * the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class" (p. 263, 66 L. ed.).

Again in the same case:

> "It is beside the point to say that plaintiffs had no vested right in equity relief, and that taking it away does not deprive them of due process of law. If, as is asserted, the granting of equitable remedies falls within the police power, and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause, which forbids the granting of equitable

relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction. The Fourteenth Amendment, as this court said in Barbier v. Connolly, already cited, intended 'not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts:* that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one [335] than are laid upon others in the same calling and condition, and that, in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses' " (p. 263-4, 66 L. ed.).

This court has consistently held that it will take jurisdiction and grant relief to persons deprived of equal protection of the law whether occurring through an act of the legislature, a decision of the courts or through the acts of an executive or administrative officer of the state. *Rogers v. State of Alabama*, 192 U. S. 226, 48 L. ed. 47; *Carter v. State of Texas*, 177 U. S. 442, 44 L. ed. 839.

Point B

Where an administrative agency has granted permits for the drilling of oil wells to other persons where all the factors and conditions were the same as surrounded the granting of permits to another person, the deprival of the latter by

action of a state court of the right to show such facts in defense of his permits denies him the equal protection of the law guaranteed by the United States Constitution.

The petitioner alleged that the Railroad Commission has, heretofore, and prior to the time of granting the permits in question to petitioner, granted numerous permits to other persons similarly situated to petitioner where all of the factors and conditions surrounding the granting of such permits were the same as surrounded the petitioner and his property on which the permits in question were granted. That such permits so granted to others were not contested or appealed from by the respondents and wells were drilled under such permits and have been producing oil from the common East Texas Oil Field in which the petitioner's property is located, and such wells are now and will continue for many years in the future to recover and produce oil from said common East Texas Oil Field. If true, as they must be considered under this record, petitioner showed a condition which under an equal application of the law entitled him to the permits in question; otherwise, persons similarly situated would enjoy rights he was not accorded. The Railroad Commission of Texas recognized this and granted him the permits just as it had done for the others. Although they had not done so with the others, the respondents appealed the Railroad Commission order to the state court. When the petitioner asserted his equal rights under the law to that accorded others identically situated, the state court by its ruling in response to respondents' exceptions held that petitioner could not be heard to urge such equality of right. By this ruling, petitioner was adjudged to have no right to the permits granted him by the Railroad Commission while others similarly situated continued to enjoy their permits granted under identical factual situations.

The petitioner insists that this constitutes an unjust discrimination and a denial of equal protection of law contrary to the United States Constitution, and that under the decisions of this court, including those cited under Point A, this court should grant the relief he seeks herein and accord him the same rights others similarly situated are enjoying.

Point C

Where an administrative agency had granted numerous permits in a particular oil field under its rule allowing such permits, when shown necessary to prevent waste, upon a showing of a prevention of waste by increasing the ultimate recovery of oil by the granting of the wells sought by such permits, and permitted the development of such field under such theory up to the time of a subsequent application for a permit in such field, the action of a state court in denying the applicant the right to show such conditions in support of his permits destroyed his right to the equal protection of law guaranteed by the United States Constitution.

The petitioner alleged that the Railroad Commission, the body authorized by law to conserve oil and gas in Texas, had promulgated its Rule 37. That such rule provided for permits to be granted in exception to such rule where necessary to prevent "waste." That prior to petitioner's application, the Railroad Commission had granted a vast number of permits in the field where petitioner's property was located upon the ground that such permits would respectively increase the ultimate recovery of oil solely because of the fact that the more wells that are drilled in the East Texas field, the greater will be the recovery of oil from such field. In other words, under the conditions affecting production in the East Texas field, more oil will be recovered by increasing the density of drilling through de-

creasing energy use in producing from shorter distances, equalizing low pressure areas, etc., than would be lost through channeling and coning of water, etc., incurred in the increased density of wells. That the field had been developed on that theory and the numerous wells granted under such theory were now operating and producing and would so continue during the life of such field. That to deny petitioner his permits under such facts would amount to an unjust discrimination and a denial of the equal protection of law and a taking of his property without due process contrary to the United States Constitution.

The respondents excepted to these allegations on the grounds that (a) the petitioner had an adequate remedy by filing suit to cancel the other permits; (b) the allegations were irrelevant, immaterial and prejudicial; and (c) that to grant permits to petitioner because of such facts, would destroy the spacing rule and its usefulness as a conservation measure.

The trial court sustained these exceptions thereby taking from petitioner his right to assert these alleged facts as a bar and defense to the action of the respondents. The decree of the Court of Civil Appeals upheld the action of the trial court.

We think it needs no argument to assert that an allegation asserting a course of dealing or facts, whereby persons similarly situated are being accorded unequal protection of the law, is relevant and material as a defense.

As to the petitioner having an adequate remedy by cancellation suits against the thousands of wells heretofore permitted on the alleged facts, the Texas Supreme Court and the Federal Circuit Court of this circuit have for years been upholding permits granted on similar facts and pronouncing it as a valid theory and legal basis for permits granted under the "waste" exception of Rule 37.

Gulf Land Co. vs. *Atlantic Refining Co.*, 113 Fed.(2d) 902, 905; *Stanolind Oil & Gas Co.* vs. *Ambrose*, 118 Fed. (2d) 847.

It was conceded as the law until the decision of the Texas Supreme Court in the case of *Railroad Commission v. Shell Oil Company*, 161 S. W. (2d) 1022, known as the Trem Carr decision.

The Trem Carr decision was not pronounced until after this permit was granted, and the respondents' suit against the petitioner had been pending for some considerable time theretofore. How far would the petitioner have gotten in canceling the several thousand waste permits outstanding under such conditions? Certainly this could not be called an adequate remedy. Was the petitioner any more required to obtain cancellation of such permits than the respondents? The respondents had tried in numerous instances theretofore to void such permits without success. Why did they not secure cancellation at such time, if it is or was an adequate remedy to the petitioner?

To reach its conclusion in the *Trem Carr* case, the Texas Supreme Court reasoned that to uphold permits on the "more wells—more oil" theory, an unjust discrimination would ensue, and that an unjust discrimination would void Rule 37 and they must adopt a construction which would uphold the validity of the rule. Faced with this statement of the law for the first time after his permits had theretofore been allowed by the Railroad Commission and subjected to attack in this suit, the petitioner in defense of his permits in such suit alleges that the Railroad Commission, for many years in the East Texas Oil Field, has granted permits on the "more wells—more oil" theory; that such field has been drilled and developed on that theory up to the present time, its peak of development; that to change now the plan of development after the majority of the wells has been drilled and deny to this petitioner the

right, which under similar conditions has been granted to others, creates a rank and unjust discrimination. Is one unjust discrimination any more important than another? Can the Texas Supreme Court construe Rule 37 so as to exclude an unjust discrimination and then refuse to relieve the petitioner from an unjust discrimination imposed by such construction? If an unjust discrimination results and it must be considered in the state of this record that it does obtain, since the petitioner has alleged that to be the fact and his allegations must be considered as true, can his defense of unjust discrimination be stricken because to prevent his unjust discrimination would result in the voiding of some particular rule or regulation? Why is not the quotation made by the Texas Supreme Court in the *Trem Carr* case from the opinion of this Honorable Court in the case of *Yick Wo* v. *Hopkins*, 118 U. S. 56, 30 L. ed. 220, equally applicable to the petitioner's situation herein?

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

POINT D

Where under the settled law of a state the rule of capture is the rule of property, the action of a state court denying the right to a leaseholder to prevent the drainage and confiscation of his property by the drilling of wells, which was his only available means under the law, denied such leaseholder the equal protection of law guaranteed by the United States Constitution and constituted a taking of his property without due process vouchsafed by the United States Constitution.

The rule of capture as to the ownership of oil and gas has ever been, and still is, the law in Texas. It follows, that at the time of purchase of the property in controversy, the petitioner became vested with the right to capture all the oil possible through wells bored on his property.

> "and inasmuch as any owner has the right subject to the regulatory power of the State to take whatever he can find by drilling on his own premises, the owner of one tract may not complain if his neighbor sinks a well on the adjoining tract and drains the oil and gas from beneath both. 31 Tex. Jur. 527, and cases cited.

This right is inviolate save as it may be restricted by the police power of the sovereignty and by the duty to use his rights so as not to damage his neighbors. Rule 37 finds its validity in this police power. We do not by this proposition attack its validity. We do say that, having a vested right circumscribed by Rule 37, the petitioner should be entitled to the same treatment and right in the interpretation of the Rule as has been accorded others. Any other treatment would constitute an unjust discrimination and an unequal protection of the law contrary to the Constitution of Texas and the United States.

By his pleadings in this instance, the petition endeavored to prove what others similarly situated had enjoyed, having no greater or different rights than he. The Court struck out such pleadings, depriving the petitioner of his equal rights and protection under our laws.

The only exception urged by respondents to petitioner's allegations in this regard was that such allegations were but the legal conclusion of the pleader and irrelevant, immaterial and prejudicial. Upon this basis solely, the trial court struck out petitioner's allegations and deprived him of his rights thereby asserted.

The allegations were a statement of a legal right of the petitioner and not a statement of a legal conclusion of the

pleader in the sense of the exception. A statement of a legal right would necessarily entail the use of the law by which the right was comprehended. It was stated as a fact and not by way of conclusion of the pleader from a statement of facts. To uphold the ruling of the court on such point would destroy the assertion of a legal right as a fact of defense.

If such legal right existed, it was permissible for the petitioner to plead it in defense and it was not irrelevant, immaterial or prejudicial in the sense it was improper to his defense.

If the only limitation on petitioner's right to drill all the wells he considered necessary to enjoy the vested property right of capture of the oil under or passing under his property was Rule 37, as undoubtedly was the situation, to deny him such a right by interpreting the rule one way as to him, but differently as to others similarly situated, would result in an unequal enforcement of the law and permit his property to be drained and confiscated by such others as he alleged and which must for this argument be conceded true while he was rendered impotent to protect his property not by the law but by the erroneous and unfounded action of the court.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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